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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-704

RONALD DENNIS YOUNG,

PETITIONER,

-vs-

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, RONALD DENNIS YOUNG, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered October 19, 1976.

OPINION BELOW

The Court of Appeals entered its published decision, No. 75-3102, on October 19, 1976. A copy of the opinion is attached as Appendix "A".

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether a District Court's denial of a motion to dismiss an indictment is an appealable order within the meaning of Title 28, United States Code, Section 1291, where the challenge to the indictment is founded upon a claim of double jeopardy?

IMPORTANCE OF THE QUESTION PRESENTED

Presently the Second, Third, Fourth and Eighth Circuit Courts of Appeals have ruled that such an order is appealable and, thus, properly the subject of pre-trial review. The Fifth and Ninth Circuit Courts of Appeals have ruled adversely. The critical importance of the fundamental constitutional guarantee involved, as well as the obvious state of confusion among the Circuit Courts of Appeals, requires this Court to address the issue. This Court granted certiorari in Abney v. United States, (75-6521) on June 14, 1976. The Solicitor General's reply brief raises the issue of the appealability of a pre-trial plea of Double Jeopardy. Therefore, this issue is presently before this Court.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> "...Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb..."

STATEMENT OF THE CASE

There have been two trials of petitioner prior to the instant petition.

Prior to the commencing of trial on December 19, 1974, one of petitioner's co-defendants, James Hunter, entered a plea of guilty to conspiracy to possess with intent to distribute cocaine. (Reporter's Transcript, hereinafter referred to as "R.T. 75-1690", 11-12). Hunter told the district court that he had discussions with another co-defendant, Michael Jones, relative to the sale of a pound of cocaine to some friends of Jones's. Hunter talked to friends of Jones including an informant and a special government agent. After lengthy discussions, Hunter agreed to sell the agents cocaine and left the discussion area and went to procure the cocaine. Hunter returned and delivered a pound of cocaine in a bag to the agents. He thereupon fled the scene after realizing the buyers were federal agents. (R.T. 75-1690, 31-32). Hunter insisted that he did not obtain the cocaine from petitioner Young; rather, he had gotten the drug from his own vehicle. (R.T. 75-1690, 34-36).

Shortly after Hunter's judicial confession, jury trial for petitioner and the remaining defendants commenced. Petitioner was found guilty by jury of conspiracy to possess and distribute cocaine and possession with intent to distribute cocaine in violation of Title 21 U.S.C. §§841(a)(1) and 846, a Schedule II controlled substance. (Clerk's Record hereinafter referred to as "C.R." 75-1690, 59).

On February 10, 1975, petitioner was committed to the custody of the Attorney General for a term of three years pursuant to 18 U.S.C. §4208(a)(2) on each count, sentences to run concurrent, along with a special parole term of three years as prescribed under 21 U.S.C. §841(b)(1)(A). (C.R. 75-1690, 63).

On June 16, 1975, petitioner moved for a new trial based upon the testimony of co-defendant James Hunter who exonerated petitioner from criminal liability in the two counts of which petitioner was convicted. Hunter testified at the evidentiary hearing that petitioner had nothing to do with the cocaine conspiracy or possession of cocaine with intent to distribute charges, as Hunter had made all the arrangements for the sale himself and had asked petitioner for a ride to the area where the agents were awaiting Hunter's return with the cocaine he had previously agreed to sell them. After the evidentiary hearing, the Honorable Edward J. Schwartz of the United States District Court for the Southern District of California granted petitioner's motion for new trial. (C.R. 75-1690, 78).

On July 29, 1975, the re-trial commenced before the Honorable Edward J. Schwartz. The facts adduced at trial are as follows:

On September 10, 1974, Drug Enforcement Agent Roger Johnson began an investigation regarding co-defendant Michael Jones in San Diego. He spoke with Jones at 11:00 a.m. and made arrangements to buy approximately one ounce of cocaine for $1,000.00 if it could be brought to the Los Angeles area. Jones arrived in a late model Pontiac with the government informant Reed and consummated

the ounce sale. (Reporter's Transcript of second trial, hereinafter referred to as "R.T. 75-3102", 13-16).

On September 17, Agent Johnson arrived in San Diego and picked up $14,000.00 at the Narcotics Task Force Office in order to do a deal with Jones and his connection. Johnson went to Jones and co-defendant Ulak's apartment and was advised the source of cocaine was not available as he was in school. (R.T. 75-3102, 23-27).

While waiting at the Jones apartment, a phone call was received and Jones said they had to go to another place 10 minutes away where the source lived. Upon arrival at the apartment complex, Jones went into an apartment and returned stating their arrival had frightened the source away. The source had a previous record for dealing and was under charges. (R.T. 75-3102, 34).

Jones later returned with co-defendant James Hunter and was introduced to Special Agent Johnson. Hunter and Johnson discussed narcotics deals. Hunter explained he had just gotten out of school, that he didn't know Johnson, that he only knew Jones, and was reluctant to deal with anyone and only knew Jones who knew Harold Reed. (R.T. 75-3102, 38-39). Upon Hunter's demand to see the money it was produced and then placed back into the trunk of the agent's vehicle. Hunter stated he had to make a phone call and disappeared with his vehicle. A few minutes later he returned from the opposite direction and discussed alternate methods of doing the transaction. Hunter was fearful because he didn't know the agents. Hunter suggested they go into the apartment and various methods were

discussed to consummate the transaction. Hunter related that he had made a phone call to his source or persons with the narcotics who was "his man". No agreement was reached between the two, and the agents, fearing that they were to be robbed, left the area to exchange the money for newspapers. (R.T. 75-3102, 45-48).

Upon returning, Special Agents Johnson and Griffin met Jones and Hunter between the apartments and Hunter asked Johnson to release the money to an area out by Coolidge Street. Hunter said his source was in the area and to give him the money and he would go get the narcotics. Johnson refused and demanded to see the narcotics first. Hunter was observed leaving the apartment area and going out towards Coolidge Street. The next time Johnson saw Hunter was when he was returning from the opposite end of the apartments. Hunter asked again to allow the money to go around the corner of the apartment building but Johnson refused. Hunter then retraced his footsteps from the area in which he had just returned. The next thing Johnson observed was a late model Pinto pull up with its lights out. Johnson observed Hunter get out of the vehicle and saw through the overhead light in the car Hunter talking to a male subject who wore a colored cap. Hunter approached Johnson and asked to let the money go to the car. Johnson refused, stating he wanted to see the narcotics. Hunter thereupon returned to the Pinto and returned to Johnson, producing the narcotics from under his armpit in a large folded grocery market bag. The bag was concealed under his shirt. (R.T. 75-3102, 49-53).

Johnson admitted at the re-trial that he prepared a report the day of the arrest and tried to put in all important details at that time. He was trying to put in as much as possible and considered that whether or not there were one or two trips would be important and he would have mentioned the two trips in his report. However, he had only placed one trip in his report. He remembered the second trip approximately one to two weeks before the first trial in December 1974. When his report was originally prepared, he had it checked for accuracy and saw no glaring weakness or discrepancies in it, and if he had seen something that was overlooked he would have changed his report at that time. (R.T. 75-3102, 85-91).

San Diego County Deputy Sheriff Lyle McCabe was stationed across the street from the transaction point watching both the area where the two vehicles were parked and the area where the Pinto eventually arrived. (R.T. 75-3102, 140, 146). Shortly after the two agents who had left the transaction area had returned about 1:00 a.m., McCabe observed a Pinto with its lights out driving south on Coolidge Street. McCabe saw the Pinto traveling slowly and just before the Pinto arrived at the north end of an alley saw a person later identified as Hunter walk up to the car and squat down by the passenger door for 15 to 30 seconds. Hunter then got in the car and the vehicle went down the alley to where the Pinto ultimately stopped. McCabe only saw the tail lights go on and did not see the headlights on at all. McCabe observed the passenger get out of the Pinto, and return to it after a short while, and then return back to the area where Johnson was. Hearing the arrest signal, McCabe crossed the street to where the Pinto

was parked and heard the sound of the car trying to start which thereupon backed into McCabe's car. (R.T. 75-3102, 142-47). A later search of the Pinto revealed a vial containing sucrose in a light blue jacket. (R.T. 75-3102, 150, 152).

McCabe admitted that in a report he prepared on the day of the arrest, Hunter is depicted as only making one trip between Johnson's position and the Pinto in which petitioner was driving. He also reviewed it prior to signing it. (R.T. 75-3102, 157-58). McCabe also did not recall seeing a dome light going on when Hunter got in the Pinto. (R.T. 75-3102, 163).

Special Agent Jones was on surveillance on another part of the area that evening and observed a Pinto and a black or blue 1957 Cadillac following each other on Burton Street, across from Coolidge. (R.T. 75-3102, 176-77). The Pinto driver faced the driver of the Cadillac for approximately 5 to 10 seconds. The Pinto then drove off and the Cadillac remained with its lights off. The Pinto's lights remained on. The 1967 Cadillac was registered to petitioner Young. After the arrest signal, Maureen Williams was arrested but later released as they were satisfied she was not involved in the transaction. (R.T. 75-3102, 178-83, 186).

Government informant Harold Reed recalled that at the time when the Pinto arrived seeing headlights pull in and park. (R.T. 75-3102, Vol. 2, 13).

James Hunter, co-defendant who had previously entered a plea of guilty testified

that on December 19, 1974, at the time of his entry of guilty plea he implicated Ulak but told the Court that Young was not involved and was not the person whom he got the cocaine from. Rather, Hunter got the cocaine out of the left front wheel well out of his wife's automobile. (R.T. 75-3102, Vol. 2, 30-34). Hunter also informed Narcotics Task Force Agent Gregory Miller in late September, when Miller came to interview him at the County Jail after his arrest, that petitioner Young was not involved in the transaction. (R.T. 75-3102, Vol. 2, 35).

After meeting Jones and Johnson, a discussion was held with Hunter on various ways to front the money to Hunter. Hunter complained that he didn't know Johnson and only knew Jones. (R.T. 75-3102, Vol. 2, 39-43). Hunter said he was going to make a phone call, get in his car, left the area and parked it in a grassy area below the apartments. From a phone number he had received earlier Hunter made a call and ordered a pound of cocaine. He gave directions to someone as to how to get to the car, which car to look for, and where to find it. The cocaine was to be left in the front wheel well. (R.T. 75-3102, 43-47).

After making the call, he returned to where Johnson and Jones were, telling them that the cocaine was on its way and would be there shortly. Hunter denied referring to his connection. Hunter finally went to pick up the package and saw a vehicle approaching him. Hunter recognized petitioner Ronald Young driving the car, approached him and told petitioner to wait because the $50.00 Hunter owed petitioner would be repaid after a business deal. (R.T. 75-3102, Vol. 2, 48-57).

When Hunter approached petitioner he had the package under his coat behind his back. Hunter rode with Young a short distance, got out of the car, and delivered the package to Johnson. He denied making more than one trip from the Pinto, and did not return to the Pinto. (R.T. 75-3102, Vol. 2, 56-60).

Hunter had met his cocaine source at the Jabber-Wocky, a private club and had made prior arrangements with him for deliveries of cocaine. Hunter did not want to talk about this person because he feared reprisals from being labeled a "snitch" and once had his clothes set on fire while in the San Diego County Jail. (R.T. 75-3102, Vol. 2, 63-67, 97).

Special Agent Griffin stated that the Pinto arrived with its lights on and was not sure if Hunter made one or two trips from the Pinto to Johnson. (R.T. 75-3102, Vol. 2, 96-A-C).

Maureen Williams was petitioner's roommate. They had argued earlier in the day. When petitioner had left Williams though he was going to another girl friend's house so she followed him. When she caught up with petitioner, he told her he was picking up some money owed to him. (R.T. 75-3102, Vol. 2, 177-188).

On August 1, 1975, the jury retired to deliberate after instructions. On August 1, 1975, the jury separated for the weekend and returned for deliberations on August 4, 1975. At the end of the day on August 4, the jury informed the Court that they had been unable to reach a verdict. When they returned to the courtroom the district court made a finding that the jury was unable to reach a verdict and

declared a mistrial. No objection was entered by petitioner to the mistrial order. (R.T. August 4, 1975, 1-6).

On August 12, 1975, petitioner filed a motion to dismiss the indictment. The government filed an opposition and on August 20, 1975, after hearing, the Court denied the motion to dismiss the indictment. (C.R. 96).

On August 28, 1975, petitioner filed a notice of appeal from the order of the district court. (C.R. 97).

On October 19, 1976, the United States Court of Appeal for the Ninth Circuit rendered its decision dismissing petitioner's appeal and finding that the district court's denial of the motion to dismiss the indictment is not a final and appealable order within the meaning of 28 U.S.C. §1291 where the challenge to the indictment is founded on a claim of double jeopardy. (Appendix "A").

REASONS FOR GRANTING THE WRIT

The fundamental ideal and guarantee embodied in the Fifth Amendment's Double Jeopardy Clause has long been recognized by this Court. Benton v. Maryland, 395 U.S. 784, 794-95 (1969).

The guarantee of the Double Jeopardy provision is that an individual not be "twice put in jeopardy". United States v. Ball, 163 U.S. 662, 669 (1896). It is clear that the Double Jeopardy provision guarantees against the potential or risk that an accused will be convicted of an offense for which he has previously stood trial. As this Court

recognized in Price v. Georgia, 398 U.S. 323 (1970):

> "The Double Jeopardy Clause... is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial...is an ordeal not to be viewed lightly." (Id., at 331).

The instant decision of the Ninth Circuit following the lead of the Fifth Circuit opinion in United States v. Bailey, 512 F.2d 833 (1975), represents the erosion of the express constitutional protection against being twice put in jeopardy. After reviewing the underpinnings of the finality rule, the Ninth Circuit concluded that:

> "...bearing the discomforture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." citing: Cobbledick v. United States, 309 U.S. 323, 325-326 (1940).

Petitioner submits that review of a pre-trial double jeopardy claim cannot await final judgment. This Fifth Amendment protection is meant to spare a once-jeopardized defendant not only a subsequent

conviction, but also a subsequent trial. The Double Jeopary provision is designed to prevent the government from:

> "...subjecting a defendant to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Green v. United States, 355 U.S. 184, 187-188 (1957); United States v. Jorn, 400 U.S. 470, 479 (1971); Serfass v. United States, 420 U.S. 377, 387-388 (1975).

Petitioner submits that to require a defendant to await final judgment clearly defeats the protection afforded against the subsequent trial. United States v. Lansdown, 460 F.2d 164, 170-171 (4th Cir. 1972); United States v. Beckerman, 516 F.2d 905, 906-907 (2d Cir. 1975); United States v. DiSilvio, 520 F.2d 247 (3d Cir. 1975); United States v. Barket, 530 F.2d 181, 185 (8th Cir. 1975).

The Cobbledick decision, which is commonly relied upon to prevent piecemeal appellate review and relied upon by the Ninth Circuit in the instant case, is important for another often overlooked statement, to-wit:

> "Finality as a condition of review is an historical characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been

> departed from only when the observance of it would practically defeat the right to any review at all." (Id., at 324-325) (Emphasis added).

This early statement of the practical necessity for exception to the strict finality rule reached fruition in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949). In Cohen, this Court recognized that if an appeal of the district court's order denying the defendant's request that plaintiff file an expense bond were not permitted, and decision of the question postponed until final judgment was entered:

> "...it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." (Id., at 546).

The Courts of Appeals in the Second, Third, Fourth and Eighth Circuits have relied upon this precedent and extended its applicability to a pre-trial denial of a plea of former jeopardy. The Court in United States v. Lansdown, supra, extensively discussed this rationale and petitioner can add very little. The Court of Appeals stated:

> In Cohen, the Court was interpreting the meaning of "final judgment" under 28 U.S.C.A. §1291 which gives the court of appeals jurisdiction "from all final decisions of the district

courts of the United States..." and thus the rule announced is equally applicable to criminal as well as civil cases. For an order to be considered "final", and thus appealable under Cohen, it must possess three characteristics: (1) it must be separable from, and collateral to, the main cause of action; (2) the right involved must be too important to be denied review; and (3) the question presented must be such that, if review is postponed until final termination of the case, the claimed right will be irreparably lost.

We believe that the district court's denial of the defendant's motion to dismiss based on a claim of double jeopardy is a final and appealable order under Cohen. First, defendant's right is under the fifth amendment and it is separable from, and collateral to, the main cause of action which is whether he is innocent or guilty of the crimes charged. Second, the right claimed is a constitutional one and, as such, it is too important to be denied review. Finally, if review is not had now, the right claimed-to be free from being twice forced to stand trial for the same offense-will be irreparably lost.

In DiBella v. United States, 369 U.S. 121 (1962), this Court determined that denial of

pre-trial suppression motions could not form the basis of an interlocutory appeal. The Court noted that such matters were not severable from the pending trial and, indeed, could "vitally affect the result". (Id., at 127). The Court further discussed the paramount concern that piecemeal appeals and the attendant delays and disruption were "...especially inimical to the effective and fair administration of the criminal law." (Id., at 126).

Petitioner submits that the instant case is readily distinguishable by the very nature of the harm which results from a delayed appeal. To forestall appellate consideration of the merits of a pre-trial plea of Double Jeopardy undermines not only the historical significance of the constitutional guarantee, but also serves to cut the heart out of this portion of the Fifth Amendment. An ex post facto verification of such a plea fails to serve the express purpose of protecting a defendant from being subjected to successive trials. To delay consideration of the merits of this unique defense to an indictment results in the absolute loss of its intended protections and guarantees.

The Ninth Circuit in the instant opinion chose to classify pre-trial appeals alleging Double Jeopardy violations with all other pre-trial appeals, stating that aggrieved defendants must await final judgment. This was necessary, the Court concluded, to prevent "an unduly expansive interpretation" of 28 United States Code § 1291. Petitioner submits this opinion was ill-advised. The considerations underlying the finality rule in criminal cases must give way to the express mandate of the Fifth Amendment's prohibition

against Double Jeopardy, and pre-trial appellate consideration of the merits of such a plea is mandatory to ensure its preservation.

CONCLUSION

For all the reasons stated herein, petitioner respectfully requests this Court to grant the writ prayed for, and review the decision below.

DATED: November 18, 1976

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
RONALD DENNIS YOUNG,
Defendant-Appellant.
No. 75-3102
OPINION

[October 19, 1976]

Appeal from the United States District Court for the Southern District of California

Before: CHOY and WALLACE, Circuit Judges, and RICHEY,* District Judge.

RICHEY, District Judge:

The question presented on this appeal is whether a district court's denial of a motion to dismiss an indictment is a final and appealable order within the meaning of 28 U.S.C. §1291 where the challenge to the indictment is founded on a claim of double jeopardy. Because we answer in the negative, we dismiss the appeal for lack of jurisdiction and do not reach the merits of appellant's constitutional claim.

In 1974 appellant was convicted in federal district court of conspiracy to possess with intent to distribute, and possession with intent to distribute, cocaine under 21 U.S.C. §§841(a)(1) and 846. In June 1975 appellant filed a motion for new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. The motion was granted after an evidentiary hearing at which a former co-defendant testified in a manner tending to exonerate appellant. Appellant's second trial commenced on July

*The Honorable Mary Anne Richey, United States District Judge for the District of Arizona, sitting by designation.

APPENDIX "A"

29, 1975. During the retrial, appellant filed two motions for judgment of acquittal. Both were denied. The case was submitted to the jury August 1. After the jury had deliberated for almost two days, the court polled the jurors as to the likelihood of reaching a unanimous verdict. The jurors responded that there was no reasonable probability of reaching a verdict if given additional time. Without objection from counsel, the court declared a mistrial. Retrial was scheduled for August 20. On August 12, appellant moved to dismiss the indictment on the ground that further prosecution of the case would constitute a violation of his fifth amendment guarantee against double jeopardy. After consideration of appellant's arguments, the district court denied the motion. Appellant thereafter filed notice of appeal from the orders of the district court denying the motions for acquittal and the motion to dismiss the indictment. He alleges jurisdiction in this Court pursuant to 28 U.S.C. §1291.

Title 28 U.S.C. § 1291 provides for jurisdiction "of appeals from all final decisions of the district courts of the United States." In the context of a mistrial, the denial of a motion for acquittal is not a final order. *United States v. Carey,* 475 F.2d 1019, 1021 (9th Cir. 1975); *United States v. Kaufman,* 311 F.2d 695, 698-699 (2d Cir. 1963). Therefore this Court is without jurisdiction to review the district court's denial of the motions for acquittal until final judgment is rendered. Similarly, as a general rule the denial of a motion to dismiss an indictment is not a final order within the meaning of the statute. *People of the Territory of Guam v. Lefever,* 454 F.2d 270 (9th Cir. 1972); *Kyle v. United States,* 211 F.2d 912 (9th Cir. 1954). Thus, were it not for appellant's claim of double jeopardy, this case could be disposed of by memorandum. However, several circuits recently have carved out an exception to the general rule of finality where a claim of former jeopardy is raised. Since the issue is one of first impression in this Circuit, we examine the question at some length.

Appellate review is not a constitutional entitlement. It is a purely statutory right, and to avail oneself of that right, one must satisfy the terms of the statute. Under 28 U.S.C. §1291, the essential condition of review is that there be a "final decision" in the case. This prerequisite of finality is founded on the long-standing policy of avoidance of piecemeal review: "Finality

as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right of a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration." *Cobbledick v. United States,* 309 U.S. 323, 324-325 (1940). *See also DiBella v. United States,* 369 U.S. 121 (1962).

The district court's denial of appellant's motion to dismiss was not final in the sense of terminating the litigation, for "[f]inal judgment in a criminal case means sentence. The sentence is the judgment." *Berman v. United States,* 302 U.S. 211, 212 (1937). Appellant, however, argues that his claim of double jeopardy removes the case from the general rule of finality. Relying on the doctrine of *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949), and its adaptation in *United States v. Lansdown,* 460 F.2d 164 (4th Cir. 1972), he contends that the motion to dismiss the indictment involved issues collateral to the main action and that to deny appeal at this time will preclude effective review of his constitutional claim. For reasons stated below, we find *Cohen* inapplicable to the instant situation.

In *Cohen* the Supreme Court recognized an exception to the rule of "finality" for orders made during the course of litigation which related to matters outside the main cause of action and which would not be subject to effective review as part of final judgment in the action. There the district court had denied defendants' request that plaintiffs file an expense bond in a shareholders' derivative suit as required under state law. In effect, the district court order had finally determined the rights at stake. Moreover, the order "did not make any step toward final disposition of the merits of the case and [would] not be merged in final judgment." 337 U.S. at 546.

The alleged right to the posting of a security bond was "separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546. The Court held

the district court's order appealable because it was "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." 337 U.S. at 547.

In subsequent decisions the Court has made clear that the *Cohen* doctrine should be limited to those few situations where the order appealed from is truly collateral to the main cause of action and not subject to review on appeal from a final judgment. In *Parr v. United States*, 351 U.S. 513 (1956), the Court rejected appellant's argument that the *Cohen* rationale should be applied to allow appeal from a dismissal of an indictment. There the government had obtained a second indictment in another district and then moved for leave to dismiss the first indictment. The district court granted the motion and defendant appealed. Finding that the district court's action was a step toward final disposition of the case and would be merged in the final judgment, the Court concluded that the order in question was not appealable. 351 U.S. at 519-520.[1]

The extension of the *Cohen* doctrine upon which appellant relies and which we today reject is found in *United States v. Lansdown, supra*. There the Fourth Circuit held that a district court's denial of a motion to dismiss an indictment based on a claim of double jeopardy was a final and appealable order. In the court's view, the right asserted under the fifth amendment met the criteria of the *Cohen* ruling: it was separable from the main issue of guilt or innocence; it was constitutional in nature

[1]The narrow applicability of *Cohen* was recently made clear in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), where the Court held appealable a district court's order imposing notice costs on the plaintiff class. The two grounds for the *Cohen* holding were set forth: (1) the order appealed from conclusively settled the rights at stake, and (2) the order concerned a collateral matter which could not be reviewed on final judgment. At 171. A decision from this Circuit further illustrates the rigorous standard imposed by *Cohen*. In *Higgins v. United States*, 205 F.2d 650 (9th Cir. 1953), we allowed appeal from an order adjudging defendant incompetent to stand trial. There we stated: "The order does not purport to merely refuse trial from day to day at the convenience of the court or for a short period of time to enable defendant to recover from a temporary upset. It is, in nature, the kind of order which would never be reviewed on direct appeal after trial." At 652. *See also Kyle v. United States*, 211 F.2d 912 (9th Cir. 1954).

and, thus, too important to be denied review; and it would be irreparably lost if review were not had before trial. 460 F.2d at 171. The court concluded that to provide a defendant with the full protection of the guarantee against double jeopardy, the decision as to whether jeopardy has attached must be reviewed prior to any retrial.[2] *Lansdown* has been adopted in three other circuits. *United States v. Barket*, 530 F.2d 181 (8th Cir. 1975); *United States v. DeSilvio*, 520 F.2d 247 (3d Cir. 1975); *United States v. Beckerman*, 516 F.2d 905 (2d Cir. 1975).[3]

In *United States v. Bailey*, 512 F.2d 833 (5th Cir. 1975), the Fifth Circuit refused to follow *Lansdown*. The court reasoned that the presence of a double jeopardy claim did not transform the trial court's interlocutory order into a final decision.

> But even if it were assumed that the second trial was forbidden as double jeopardy, that does not invest us with jurisdiction to vindicate such right. The Constitution does not guarantee an appeal. That comes wholly from the statute. . . . At least so long as a criminal case is pending, review of such matters as, for example, unlawful search and seizure, unlawful arrest, unlawful detention, unlawful indictment, unlawful confession, must await the trial and its outcome. 512 F.2d at 835, quoting from *Gilmore v. United States*, 264 F.2d 44, 46 (5th Cir. 1959).

We agree with the Fifth Circuit. Review of the district court's denial of appellant's motion to dismiss the indictment should be postponed until final judgment is obtained. Unlike the defendants' request for an expense bond in *Cohen*, appellant's claim of double jeopardy does not concern a purely collateral matter.

[2]We note that the court expressly narrowed the applicability of its holding "to that very small number of criminal cases in which a mistrial is declared against the wishes of the defendant." 460 F.2d at 172. Thus, on its face, the decision does not encompass the present proceedings. However, the Fourth Circuit has subsequently given the case broad application. *See United States v. MacDonald*, 531 F.2d 196 (4th Cir. 1976).

[3]In *United States v. Alessi*, ___ F.2d ___ (2d Cir. July 7, 1976), the court, in a lengthy discussion, expressed disagreement with the holding of *Lansdown*, but bowed to its own precedent, noting the grant of certiorari June 14, 1976, in *Abney v. United States*, ___ F.2d ___ (3d Cir. Feb. 9, 1976).

Rather, it is a challenge to the validity of the prosecution itself. The district court's rejection of appellant's claim was a step toward final resolution of the main action. The constitutional claim will be merged in the final judgment and may be reviewed on appeal from that judgment.

In so holding, we do not overlook the unique nature of the double jeopardy guarantee as compared to other constitutional rights. Unlike a fourth amendment claim or a claim based on the guarantee against self-incrimination, the double jeopardy claim goes to the very power of the government to bring an individual into court to answer the charge against him. *Menna v. New York,* 423 U.S. 61 (1975); *United States v. Wilson,* 420 U.S. 332 (1975); *Blackledge v. Perry,* 417 U.S. 21 (1974). Denying review at this time may subject appellant to a prosecution which the government has no right to initiate. However, "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship. The correctness of a trial court's rejection even of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." *Cobbledick, supra,* 309 U.S. at 325-326.

Moreover, denying interlocutory review of appellant's double jeopardy claim is consistent with early opinions from the Supreme Court. In *Rankin v. The State,* 78 U.S. (11 Wall.) 380 (1870), the Court held that a state court's rejection of defendant's plea of a prior acquittal for the same offense was not a final judgment and, thus, not appealable. And in *Heike v. United States,* 217 U.S. 423 (1910), the Court found non-appealable a district court's denial of defendant's plea of immunity to further prosecution.[4]

Finally, we note that the delays and disruptions caused by intermediate appeals are especially detrimental to the effective administration of the criminal law. *DiBella v. United States,*

[4]In dicta the Court in *Heiki* remarked that a plea of double jeopardy was likewise not appealable until final judgment. "[A] plea of former conviction under the constitutional provision that no person shall be twice put in jeopardy for the same offense does not have the effect to prevent a prosecution to final judgment, although the former conviction or acquittal may be finally held to be a complete bar to any right of prosecution. . . ." 217 U.S. 433.

supra. Rather than give 28 U.S.C. §1291 an unduly expansive interpretation, we prefer to limit aggrieved defendants to review after final judgment, or, under exceptional circumstances, to relief pursuant to the extraordinary writs.[5]

Appeal dismissed.

[5]Title 28, Rules of Appellate Procedure, Rule 21. *See, e.g., Goldman, Sachs & Co. v. Edelstein,* 494 F.2d 76 (2d Cir. 1974).

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No. 76-704

In the Supreme Court of the United States

OCTOBER TERM, 1976

RONALD DENNIS YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846. On petitioner's motion, the district court set aside the conviction and awarded petitioner a new trial after one of petitioner's co-defendants gave testimony tending to exculpate petitioner (Pet. App. A, p. 1). A second trial ended in a mistrial when the jury, after two days of deliberation, was unable to reach a verdict; the mistrial was declared without any objection by petitioner (*id.* at 2).

Petitioner then moved to dismiss the indictment, claiming that another trial would violate the Double Jeopardy Clause. The district court denied this motion, and petitioner appealed. The court of appeals dismissed the appeal, concluding that a district court's rejection of a

double jeopardy claim is not reviewable by appeal except on review of a final judgment of conviction (Pet. App. A, pp. 1-7). Petitioner argues that the court of appeals should have disposed of his appeal on the merits.

The question presented by the petition in this case is identical to a question this Court will consider in *Abney* v. *United States*, No. 75-6521, certiorari granted, June 14, 1976. We ordinarily would request the Court to hold this case pending its decision in *Abney* and to dispose of this petition as appropriate in light of that decision.[1] We believe, however, that in this case the Court should exercise its discretion to deny the petition forthwith, despite the identity of the issues presented.

The first trial in this case took place in 1974, and the second ended in a mistrial on August 4, 1975 (Pet. 10-11). The court of appeals did not dismiss the appeal until October 19, 1976. There has already been lengthy delay in this case, and additional delay would be inconsistent with the need for the prompt resolution of criminal cases. Even if the Court were to disagree with our submission in *Abney* and hold that courts of appeals have jurisdiction over interlocutory appeals from denials of double jeopardy claims, petitioner could not benefit from that holding. Petitioner's argument that the Double Jeopardy Clause bars another trial after a mistrial has been declared because of jury disagreement — where, as here, the jury had deliberated for two days and there was no objection to the declaration of a mistrial — is frivolous. See *United States* v. *Perez*, 9 Wheat. 579, 580; *United States* v. *Sanford*, No. 75-1867, decided October 12, 1976. A decision by the court of appeals on the merits of

[1]We have furnished to counsel for petitioner a copy of our brief in *Abney*.

petitioner's arguments therefore would avail him nothing, yet it would produce still more delay in a case that has experienced too much delay already. We therefore request the Court to deny the petition for a writ of certiorari so that petitioner's trial, which is plainly not barred by double jeopardy principles, may go forward promptly.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1976.